MOHD SYED SYED JAMALUDIN & ORS v. MMIP SERVICES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[ORIGINATING SUMMONS NO: WA-24NCVC-1594-08-2021]
17 FEBRUARY 2022

Abstract – *The plaintiffs, having obtained final judgments from the High Court of Singapore in legal proceedings which the defendants refused to participate in, are clearly entitled to register and execute the same in Malaysia in accordance with the provisions of the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). The defendants' ex parte order, declaring that they are not liable to any judgment of the Singapore Court, would have the invidious effect of being incongruent with the very raison d'etre of the REJA, and would fall within the category of 'contravention of statute'. If allowed to stand, the ex parte order has the dire consequence of violating the provisions on reciprocal enforcement of judgments between the courts in Malaysia and Singapore – by preventing the plaintiffs from relying on the REJA.*

CIVIL PROCEDURE: *Judgments and orders – Ex parte order – Application to set aside ex parte order declaring defendants not made liable to judgment of Singapore court against them in relation to accident which occurred in Muar – Whether action arising from accident within jurisdiction of courts in Malaysia – Plaintiffs obtained final judgments from High Court of Singapore – Whether plaintiffs entitled to register and execute same in Malaysia – Whether requirements under s. 3(3) of Reciprocal Enforcement of Judgments Act 1958 met – Whether ex parte order prejudiced plaintiffs – Whether ex parte order had dire consequence of violating provisions on reciprocal enforcement of judgments between courts in Malaysia and Singapore – Whether ex parte order ought to be set aside*

On 24 December 2016, a bus accident occurred at the North South Expressway near Muar, Johor. The said vehicle was driven by the third defendant who was alleged to be the servant and/or agent of the second defendant. The second defendant was insured by the first defendant at all material times. It was said that the third defendant had driven at a high speed, had lost control of the vehicle which then plunged into a ravine, killing six men and eight women, including one child, with another seven Malaysians, six Singaporeans, two Myanmar nationals, sustaining serious injuries. The plaintiffs, in this originating summons ('OS'), claimed to have been victims of the said accident. The first, third, fourth, sixth and ninth plaintiffs had all suffered severe, debilitating and crippling injuries, while the second, fifth, seventh and eighth plaintiffs were the administrators of the deceased victims, who had sustained serious injuries but had since passed away. Despite action

in negligence for compensation having been taken in the Singapore court, the first defendant (insurer) as well as the owner and driver of the bus did not submit to the jurisdiction of the courts in the Republic of Singapore but instead managed to obtain an *ex parte* order from this court declaring that the action arising from the accident, having occurred in Muar, was properly within the jurisdiction of the courts in Malaysia, and that they could not be made liable to any judgment of the Singapore court against the owner and the driver in relation to the accident. The plaintiffs sought to set aside the said *ex parte* order. The defendants argued that: (i) the rights of the defendants would be seriously affected following the judgment obtained by the plaintiffs such that there would be a real likelihood of execution of the said Singapore judgment in pursuance of the Reciprocal Enforcement of Judgments Act 1958 ('REJA'); (ii) they sought the *ex parte* order following the refusal of the plaintiffs to file the suit in Malaysia, and that there was no requirement in law for the defendants to notify the plaintiffs of the intended filing of the *ex parte* application because the plaintiffs did not come within the definition of 'plaintiff' under s. 96(3) of the Road Transport Act 1987 ('RTA'); and (iii) the High Court's jurisdiction to make an *ex parte* order was unlimited, subject only to its own discretion. The plaintiffs, on the other hand, took issue with the course of action taken by the defendants, and especially with the granting of the *ex parte* order. Primarily, the defendants were fully aware of the suits filed at the High Court of Singapore and had been apprised of the development of the proceedings at the Republic, by the plaintiffs themselves. The key grievance of the plaintiffs, therefore, was that despite having been kept informed of virtually every step of the proceedings pursued by the plaintiffs in Singapore, the defendants had taken the conscious decision not to take any step to either enter an appearance at the High Court of Singapore or mount a challenge on the jurisdiction of the High Court of Singapore. Further, the plaintiffs argued that there was a breach of natural justice in that the *ex parte* order could not be allowed to stand without the court hearing the plaintiffs.

Held (allowing application):

(1) The defendants had raised a preliminary objection, arguing that as the plaintiffs' affidavits were sworn in English in Singapore, these affidavits were defective pursuant to s. 8 of the National Language Act 1963/1967 ('NLA'), O. 41 r. 13 and O. 92 r. 1(1) of the Rules of Court 2012. Order 41 r. 13 specifically provides that unless the court otherwise orders, an affidavit of a deponent affirmed outside Malaysia may be filed in English and need not be accompanied by a translation in Malay. And under O. 41 r. 12, an affidavit taken outside Malaysia is admissible without proof of seal. In any event, the defendants did not apply to the court for an order under O. 42 r. 13 that the plaintiffs' affidavits should only be admitted as evidence if they were accompanied by a Malay translation. Not only that, the defendants had managed to reply to all of

the plaintiffs' affidavits. There was absolutely no prejudice to the defendants occasioned by the fact that the plaintiffs' affidavits were entirely in English. This preliminary objection was without merit. (paras 10 & 17-19)

(2) The plaintiffs, having obtained the final judgments from the High Court of Singapore in the proceedings which the defendants refused to participate in, were clearly entitled to register and execute the same in Malaysia in accordance with the provisions of the REJA. The plaintiffs had met all the three requirements stated in s. 3(3) of the REJA, namely that the judgments were those of a superior court which were firstly final and conclusive as between the parties thereto; secondly, there was payable thereunder a sum of money, and thirdly the judgments were from a country specified in the First Schedule to the said Act. The justice of the case would not permit this court to allow the earlier order to stand in light of the inequity and prejudice that could be occasioned to and suffered by the plaintiffs. (paras 38-41)

(3) If allowed to stand, this *ex parte* order – declaring that the defendants were not liable for the accident and in the circumstances where the defendants intentionally refusing to defend the claims against them in Singapore, would have the invidious effect of being incongruent with the very *raison détre* of the REJA – which is a legislation providing for the reciprocal enforcement of judgments of superior courts between participating countries. This would be within the category of 'contravention of statue', warranting the setting aside of the *ex parte* order. (para 46)

(4) The defendants were concerned about the REJA but deliberately allowed the plaintiffs to pursue their claims against the defendants in Singapore without even entering appearance much less registering any resistance. And then, with the *ex parte* order, the defendants wished that any proceedings under the REJA be pre-empted. Yet the defendants had every right to be heard and contest the proceedings under the REJA if and when the plaintiffs make the necessary application thereunder. The defendants' argument on the fears concerning the REJA was not only unfair but also less than well grounded. As such, the *ex parte* order ought to be set aside as it would not only prejudice the plaintiffs who were not heard but also deprive them of the opportunity to exercise their statutory right to invoke the provisions of the REJA to enforce a judgment obtained in their favour in the High Court of Singapore. It prevented the exercise of a statutory right under the REJA. For all intents and purposes, it defeated the application of the REJA. (paras 48-50)

(5) The issue of forum of convenience was of no relevance at this stage given that judgments on the legal suits had been granted by the High Court of Singapore, and the same were eligible to be registered and enforced in accordance with the relevant provisions under the REJA. It was also not relevant to the setting aside of the *ex parte* order because the application was not a transfer application, which was only applicable to settle the conflict of localities within the different branches of the High Court and the lower courts of Malaya. In any event, whilst the defendants' place of residence and the place of the accident was undoubtedly in Malaysia, the material witnesses of this accident, other than for the defendants, were all from Singapore. All of the plaintiffs were residing in Singapore. The doctors and medical professionals treating the plaintiffs as well as the administrators of the deceased plaintiffs were also all from Singapore, and some of the plaintiffs had practical difficulties to travel to Johor given the serious injuries sustained from the accident. It certainly could not be said that the place of business of the defendants and the place of accident must mean that the forum of convenience would be in favour of the Sessions Court in Muar. After all, the relevant conditions were to be applied disjunctively. (paras 51-54)

(6) The *ex parte* order sought by and granted to the defendants was not premised on any application for a declaration under s. 96(3) of the RTA. As such, the argument that the plaintiffs were not entitled to the notice under s. 96(3) was irrelevant. The OS was filed by the plaintiffs not due to any complaint about the failure of the defendants to serve their notice to the plaintiffs under s. 96(3) of the RTA. Their grievance was predicated on the defendants' action in obtaining the *ex parte* order despite having the knowledge that final judgments had been granted to the plaintiffs in Singapore, with the effect that the enforcement of the REJA, an act of Parliament in force in Malaysia, was now potentially frustrated. For all intents and purposes if allowed to stand, the *ex parte* order had the dire consequence of violating the provisions on reciprocal enforcement of judgments between the courts in Malaysia and Singapore – by preventing the plaintiffs from relying on REJA. (paras 61-66)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2010] 1 CLJ 444 CA ***(refd)***

Datuk M Kayveas v. PV Das [1997] 4 CLJ 544 CA ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Mohamad Rafiq Muiz Ahmad Hanipah v. Pacific & Orient Insurance Co Bhd & Ors [2018] 1 LNS 942 HC ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Siti Nur Aishah Ishak v. Golden Plus Holdings Bhd [2017] 8 CLJ 272 CA ***(refd)***

Standard Chartered Bank (Singapore) Ltd v. Pioneer Smith (M) Sdn Bhd [2015] 7 CLJ 677 HC ***(refd)***
Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 9 CLJ 358 FC ***(refd)***
Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***
Tawin Industries (M) Sdn Bhd v. FEC Cables (M) Sdn Bhd [2005] 5 CLJ 140 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
National Language Acts 1963/1967, s. 8
Reciprocal Enforcement of Judgments Act 1958, ss. 3(3), 5, 6, First Schedule
Road Transport Act 1987, s. 96(1), (3)
Rules of Court 2012, O. 41 rr. 12, 13, O. 57, O. 92 r. 1(1)
Subordinate Courts Act 1948, s. 59

For the plaintiffs - Darren Lai & Chew Zhen Tao; M/s Richard Wee Chambers
For the defendants - Reuben Netto, Silva Velu & Monisha Pandey; M/s Silva Velu & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This was the plaintiffs' application by way of an originating summons ("this OS") primarily for a declaration that an *ex parte* order dated 16 July 2021 granted by this court in another Originating Summons (No: WA-24NCVC-1306-07-2021) ought to be set aside.

[2] After hearing parties, in a proceeding conducted by way of remote communication technology *via* Zoom, I allowed the application, and highlighted the main reasons for the same. This judgment contains the full reasons for the decision.

Key Background Facts

[3] This case is all about a very tragic bus accident at the North South Expressway which occurred on 24 December 2016, near Muar in the state of Johor. The bus had departed from JB Sentral in Johor Bahru and enroute to Kuala Lumpur's Bandar Tasik Selatan Integrated Bus Terminal.

[4] The said vehicle, bearing registration number AJC6633, was on that fateful day driven by the third defendant who was alleged to be the servant and/or agent of the second defendant.

[5] It was said that he was on the wheels at the time at a high speed, had lost control of the vehicle which then plunged into a ravine, killing six men and eight women, including one child, with another seven Malaysians, six Singaporeans, two Myanmar nationals and one other person whose nationality was not identified, sustaining serious injuries.

[6] The plaintiffs in this OS claimed to have been victims of the said accident. The first, third, fourth, sixth and ninth plaintiffs had all suffered severe, debilitating and crippling injuries, the second and fifth plaintiffs are both the administrators of a deceased victim, who had sustained serious injuries and but has since passed away, whilst the seventh plaintiff is the administrator of another deceased victim who had succumbed to her serious injuries and has also died. The same goes for the eighth plaintiff, who is the administrator of another lady, who had sustained serious injuries and has unfortunately passed away as a result thereof.

[7] The Malaysian Land Public Transport Commission had suspended the second defendant's license with immediate effect following the accident. The second defendant was insured by the first defendant at all material times.

[8] The crux of the dispute may be simply stated in this manner. Despite action in negligence for compensation having been taken in the Singapore Court, the first defendant (the insurer) as well as the owner and driver of the bus did not submit to the jurisdiction of the courts in the Republic but instead managed to obtain an *ex parte* order from this court declaring that the action arising from the accident, having occurred in Muar, is properly within the jurisdiction of the courts in Malaysia, and that they could not be made liable to any judgment of the Singapore Court against the owner and the driver in relation to the accident.

[9] The plaintiffs now sought to set aside the said *ex parte* order.

Evaluation & Findings Of This Court

Language Of Affidavit

[10] There is one preliminary objection raised by the defendants. They argued that as the plaintiffs' affidavits are sworn in English in Singapore, these affidavits are defective pursuant to s. 8 of the National Language Acts 1963/1967 ("the NLA"), O. 41 r. 13 and O. 92 r. 1(1) of the Rules of Court 2012, whereby the admissibility of an affidavit in a foreign language cannot be automatically admitted unless the court otherwise orders the exclusion of the translation in the national language. Additionally, s. 8 of the NLA provides for the need for an application to be made by any party to regularise the proceedings in the National Language or partly in English.

[11] The defendants also referred to the case *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2010] 1 CLJ 444; [2010] 2 MLJ 41 where the court held as follows:

> This court must strictly enforce the need to file court documents in the Malay language as ordained by the law in this country. Pursuant to O. 92 r. 4 of the Rules of the High Court 1980, the filing of the memorandum of appeal in the English language constituted an injustice to the respondent and it was an abuse of the process of the court.

[12] The plaintiffs disagreed with this argument. And like the defendants, the plaintiffs also referred to O. 41 r. 13 of the Rules of Court 2012. It reads:

> **13. Language of affidavit (O. 41 r. 13)**
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> An affidavit of a deponent affirmed outside the jurisdiction may be filed in the English language and, unless the Court otherwise orders, need not be accompanied by a translation in the national language.

[13] It is the position taken by the plaintiffs that on the clear language of O. 41 r. 13 as the plaintiffs' affidavits herein were affirmed in Singapore, they may be filed in the English language since this court did not order otherwise, and that the affidavits need not therefore be accompanied by a translation in the national language, *ie*, Bahasa Malaysia.

[14] I cannot but readily agree with this, as the words in O. 41 r. 13 are free from any ambiguity. What is less clear is the basis of the defendants' reliance on O. 41 r. 13 since it does not advance their case. It may well be the view that finds support in cases such as *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729; [1994] 2 MLJ 420 which established the necessity to ensure documents are filed in the national language.

[15] But some of the earlier authorities no longer represent the present state of the law in Malaysia on this subject. Specifically, under the previous Rules of High Court 1980, there was no equivalent of the said O. 41 r. 13 of the Rules of Court 2012.

[16] Section 8 of the NLA provides as follows:

> **8. Language of Courts**
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> All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:
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> Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

[17] Order 41 r. 13 has specifically provided that unless the court otherwise orders, an affidavit of a deponent affirmed outside Malaysia may be filed in English and need not be accompanied by a translation in Malay. And under O. 41 r. 12, an affidavit taken outside Malaysia is admissible without proof of seal. For completeness, I should add that the case of *Dato' Seri Anwar Ibrahim* (*supra*) referred to by the defendants is quite irrelevant as it concerned a memorandum of appeal which was filed in English. It has nothing to do with affidavits which is the issue now before this court.

[18] In any event, the defendants did not apply to court for an order under O. 42 r. 13 that the plaintiff's affidavits should only be admitted as evidence if they were accompanied by a Malay translation. Not only that, the defendants had managed to reply to all of the plaintiffs' affidavits. I find that there is absolutely no prejudice to the defendants occasioned by the fact that the plaintiffs' affidavits were entirely in English.

[19] This preliminary objection is as such without merit.

Background And Status Of Proceedings

[20] It is apposite that the chronology of the events be stated *albeit* in summary fashion. A law firm in Singapore representing the plaintiffs, Messrs United Legal Alliance LLC, now known as Messrs Civic Legal LLC ("CLL") had first notified the first defendant, as the insurers of the bus, on the intended proceedings to be filed in Singapore Courts. The first defendant then engaged Messrs Silva Velu & Co to respond to CLL's notice. The response given was that the Singapore courts had no jurisdictions to hear the matter as the cause of action arose in Malaysia and the first defendant would not submit to the courts' jurisdiction in Singapore.

[21] Despite the stance of the first defendant, CLL, for the plaintiffs, proceeded in their claim and managed to enter judgment in the absence of the first defendant on 3 February 2020 and even proceeded to have damages assessed on 23 February 2021. The decision was delivered on 28 April 2021.

[22] Whilst the first defendant was unaware whether CLL had served the interlocutory judgment and final judgment on the insured and its driver, the first defendant successfully applied to this court on an *ex parte* basis to obtain the aforesaid declaratory reliefs.

[23] The principal arguments submitted by the defendants then before this court are that first it was argued that the rights of the defendants would be seriously affected following the judgment obtained by the plaintiffs such that there would be a real likelihood of execution of the said Singapore judgment in pursuance of the Reciprocal Enforcement of Judgments Act 1958 ("the REJA"). Secondly, they sought the *ex parte* order following the refusal of the plaintiffs to file the suit in Malaysia, and that there was no requirement in law for the defendants to notify the plaintiffs of the intended filing of the *ex parte* application because the plaintiffs did not come within the definition of "plaintiff" under s. 96(3) of the Road Transport Act 1987 ("the RTA").

[24] Thirdly, the High Court's jurisdiction to make an *ex parte* order is unlimited, subject only to its own discretion. In that regard, the defendants also placed reliance on the following passage from the judgment of the Federal Court in the case of *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101:

Numerous authorities were cited by the parties in support of their submissions to show the manner in which the discretion should be exercised. I do not think it necessary to refer to all of them for the purpose of this judgment. The basis of the jurisdiction is Order 25 rule 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion. In *Ibeneweka v. Egbuna* [1964] 1 WLR 219 224 Viscount Radcliffe in giving the decision of the Privy Council stated:

> The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealously,' with 'extreme caution,' with 'the utmost caution.' These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

[25] The plaintiffs on the other hand, took issue with the course of action taken by the defendants, and especially with the granting of the *ex parte* order. Primarily, the defendants are and were fully aware of the suits filed at the High Court of Singapore and had been apprised of the development of the proceedings at Republic, by the plaintiffs themselves.

[26] This could be seen from first, the notices of demand dated 27 August 2019 had been served on the first and second defendants, and secondly, the writs of summons had been duly served on the first defendant, and duly acknowledged by the first defendant's solicitors, Messrs Silva Velu & Co. Thirdly, given that the defendants took no further action to enter an appearance at the High Court of Singapore, the plaintiffs were able to enter judgments against the second defendant in default of appearance on 31 January 2020 and 3 February 2020. These judgments were served on the second defendant by Messrs United Legal Alliance LCC and acknowledged receipt by the second defendant on 27 November 2020.

[27] Fourthly, the plaintiffs had then served no fewer than six affidavits of evidence in chief on the second defendant which were later fixed for the assessment of damages hearing on 23 February 2021, for which the first and second defendants were duly notified *vide* a notice dated 16 February 2021. Fifthly, subsequently, following the conclusion of the assessment hearing, the

A plaintiffs served the final judgment by the High Court of Singapore in Suit No: HC/S 1019/2019, HC/S 1021/2019, HC/S 1023/2019, HC/S 1026/2019, HC/S 1027/2019 and HC/S 1028/2019 all dated 28 April 2021 to the first defendant on 2 July 2021. For this, the plaintiffs though their solicitors, Messrs Civic Legal LCC demanded payment of the judgment sum awarded.

B **[28]** The key grievance of the plaintiffs therefore is that despite having been kept informed of virtually every step of the proceedings pursued by the plaintiffs in Singapore, the defendants have taken the conscious decision not to take any step to either enter an appearance at the High Court of Singapore or mount a challenge on the jurisdiction of the High Court of Singapore.

C **[29]** Indeed, when served with the notices of demand, the defendants' solicitors stated that only the courts in Malaysia have jurisdiction to hear the matter, and after being served with the writs of summons, no steps were taken by the defendants to object to the same, let alone challenge the jurisdiction of the High Court of Singapore. Similarly, when served with the D notice of appointment for assessment of damages dated, the first defendant only replied that it did not submit to the jurisdiction of the Courts of Singapore. Yet, the defendants again took no steps to challenge the jurisdiction of the High Court of Singapore. Given this, neither have the plaintiffs been offered with settlement proposals let alone paid any E compensation by the defendants.

[30] The point is as argued by the plaintiffs, correctly in my view, the non-reaction and inactivity on the part of the defendants had implicitly allowed the hearing of the assessment of damages for the plaintiffs to proceed. And equally importantly the defendants have not taken any steps to set aside the F final judgments issued by the High Court of Singapore. The defendants had all the time and opportunity to enter appearance or challenge the jurisdiction of the High Court of Singapore but chose to do neither. The defendants undoubtedly had ample opportunity to enter appearance and/or challenge the jurisdiction of the High Court of Singapore but had deliberately G determined not to do so. There is also absolutely no suggestion that there was any impediment to do so.

[31] Even more so, the first defendant had even requested that it be informed should enforcement be sought by way of the reciprocal enforcement process. This goes to show that the defendants were fully H cognisant of the fact that the plaintiffs had the right to register the final judgment obtained by invoking the REJA.

[32] The basis for this application to set aside the said *ex parte* order is the leading Federal Court decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 whereby the I Federal Court held that orders that have been obtained, amongst others, in breach of rules of natural justice can be set aside.

[33] Mohd Azmi FCJ, in one of the judgments delivered in that case instructively held as follows: A

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'. B C D
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> *The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'.* Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p. 39 provides the correct guideline on the subject: E
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> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'. F G
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> *For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be* H I

A *exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.* (emphasis added)

B **[34]** There is also authority which holds that as observed by Mahadev Shankar JCA in the case of *Datuk M Kayveas v. PV Das* [1997] 4 CLJ 544; [1997] 3 MLJ 671 in relation to *ex parte* orders that:

> Notwithstanding s. 67 of the Courts of Judicature Act 1964, the proper remedy in the High Court for a party aggrieved by an order made ex parte in his absence is not to appeal but to apply to have it set aside by the judge who made it (see O. 13 r. 8, O. 14 r. 11, O. 19 r. 9, O. 32 r. 6 and O. 35 r. 2 of the RHC read with r. 14 of the Rules).

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[35] The principal basis for the plaintiffs' application herein is therefore a breach of natural justice in that the *ex parte* order cannot be allowed to stand without the court hearing the plaintiffs. Here, as highlighted earlier, the first and second defendants had been duly notified of every step of the proceedings and had reasonable if not ample opportunities to challenge the jurisdiction of the High Court of Singapore. They chose not to. They instead asked the plaintiffs to inform them should the plaintiffs initiate proceedings under REJA but on their part the defendants did not exhibit good faith when they did not extend the plaintiffs the reciprocity the latter deserved when the defendants proceeded to obtain the *ex parte* an order to nullify the final judgments obtained in Singapore.

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[36] Of relevance is the decision of *Tawin Industries (M) Sdn Bhd v. FEC Cables (M) Sdn Bhd* [2005] 5 CLJ 140; [2005] 1 MLJ 728 where the High Court held that a defendant who wishes to challenge the jurisdiction of the court must enter a conditional appearance. The following passages from the judgment of the court are significant:

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> 13. In my view, the defendant's filing of unconditional appearance gives rise to the defendant's submission to the jurisdiction of the High Court of Malaya at Melaka and so the defendant has waived his right to challenge the jurisdiction of this court, notwithstanding the defendant's conduct in filing this application which is in effect mounting a challenge based on jurisdiction. The defendant cannot be allowed to blow hot and cold or approbate and reprobate (per Peh Swee Chin FCJ in *Development and Commercial Bank supra*).
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> 15. *In dismissing the application, Abdul Malek Ahmad J (now PCA) applied the principles enunciated by the Court of Appeal (Singapore) in The 'Avro' supra and explained at p. 262 D-G that the effect of entering an unconditional appearance is twofold ie. it waives any irregularity of the writ or its service, and the defendant is considered to have submitted to the jurisdiction of the court, and that a defendant who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance.* (emphasis added)

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[37] It is of course true that most of these facts were not unknown to the court when granting the *ex parte* order on 16 July 2021. But that was in the nature of an *ex parte*, without representation from the plaintiffs and a result of an exercise of judicial discretion. And now that the plaintiffs have surfaced and challenged the said order and made representation against it and sought to have it set aside, I examined again the basis of granting the *ex parte* order but after considering the affidavits and submissions of the parties, including particularly on the application of REJA, arrived at the conclusion that it cannot now be sustained.

[38] The justice of the case would not permit this court to allow the earlier order to stand in light of the inequity and prejudice that could be occasioned to and suffered by the plaintiffs. This stance, in my view, is in accord with the principle enunciated in the Court of Appeal case of *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651 where it was emphasised that the remedy of declaration – which was what the *ex parte* order was about – as embodied in s. 41 of the Specific Relief Act 1950 is discretionary in nature.

[39] In that case, Gopal Sri Ram JCA (as he then was) further instructively elaborated on the application of the relevant principle as follows:

> Although s. 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v. Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 at p. 507 per Lord Sterndale MR), yet, the remedy of declaration may be refused upon settled principles. *Thus, generally speaking, the court will not grant a declaratory judgment* where an adequate alternative remedy is available (*Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v. Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong & Anor* [1970] AC 1136) or *where a plaintiff is guilty of laches (Faber Merlin (M) Sdn Bhd v. Lye Thai Sang & Anor [1985] 2 MLJ 380) other inequitable conduct (City of London v. Horner (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (Trawnik & Anor v. Ministry of Defence [1984] 2 All ER 791) or with an improper motive, is sought (Everett v. Griffiths [1924] 1 KB 941 at p. 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.*
> (emphasis added)

[40] An important consideration that the plaintiffs having obtained the final judgments from the High Court of Singapore in the proceedings which the defendants refused to participate in, are clearly entitled to register and execute the same in Malaysia in accordance with the provisions of REJA.

[41] For the plaintiffs appeared to have met all the three requirements stated in s. 3(3) of the REJA, namely that the judgments are those of a superior court which are firstly final and conclusive as between the parties thereto; secondly, there is payable thereunder a sum of money, and thirdly the judgments are from a country specified in the First Schedule to the said Act.

[42] The defendants must have known this, and this was most probably their dominant motivation for seeking the *ex parte* order, on the declaration that the defendants were not liable for the accident. This is almost akin to the act of 'unilaterally contracting out' of a statute. Which cannot ultimately succeed.

[43] The defendants relied on another passage from the judgment of Mohd Azmi FCJ in *Badiaddin Mohd Mahidin* (*supra*) as follows:

> [1] It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on the ground of illegality or lack of jurisdiction. *The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases, where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.* (emphasis added)

[44] The above, which is in fact taken from the headnotes of the judgment in *Badiaddin Mohd Mahidin* (*supra*) as reported in Current Law Journal in fact supports the position of the plaintiffs, for in the instant case before me, there is much substance to the contention that the defect in the *ex parte* order is of such a serious nature that calls for the same be "set aside to enable this court to do justice".

[45] The position in *Badiaddin Mohd Mahidin* (*supra*) is reaffirmed in a recent Federal Court decision of *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 9 CLJ 358; [2020] 12 MLJ 237 where it was emphasised thus:

> [78] It is important to emphasise that this appeal does not engage the inherent jurisdiction of the court to set aside a judgment on the grounds of illegality, or because it is null and void for the contravention of a statute, or by reason of a breach of the rules of natural justice, as expounded by the landmark cases of *Badiaddin and Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 ('*Serac*').

[46] If allowed to stand, this *ex parte* order – declaring that the defendants are not liable for the accident and in the circumstances where the defendants intentionally refusing to defend the claims against them in Singapore, would have the invidious effect of being incongruent with the very *raison d'etre* of REJA – which is a legislation providing for the reciprocal enforcement of judgments of superior courts between participating countries. This in my view would be within the category of "contravention of statute" as stated by leading authorities, warranting the setting aside of the *ex parte* order.

[47] It would not be out of place for me to refer to the case of *Standard Chartered Bank (Singapore) Ltd v. Pioneer Smith (M) Sdn Bhd* [2015] 7 CLJ 677 where I had occasion to say this on REJA:

> [13] A little bit of history and background for context. It was as early as during the 17th century that English courts started giving recognition by enforcing foreign judgments, the theoretical basis being the concept of comity between nations, where the court of one nation is required to assist those of others. Subsequent developments saw the basis of enforcement to be on the doctrine of obligation whereby foreign judgments are enforced in England on the premise that such judgment over the defendant imposes a duty on the defendant to pay the sum for which judgment is given, and for which the courts in England are bound to enforce. This basically means that upon the delivery of the judgment, it must be enforced everywhere. The case of *Anthinarayana Mudaliar v. Ajit Singh* [1953] 1 LNS 2; [1953] MLJ 228 is authority for the proposition that this is also the foundation of the enforcement of judgment between Malaysia and Singapore prior to the enactment of REJA. REJA however enshrines legal reciprocity, which arguably has a stronger theoretical affinity with the concept of comity, and which is generally effective only to the extent that foreign judgments do not directly conflict with the other country's public policy (such as reflected in provisions contained in ss. 3(2), 5(1)(a)(v) and 9(1) of REJA).

[48] The alleged fears expressed by the defendants concerning REJA must be put in proper context. They are understandably concerned about REJA but deliberately allowed the plaintiffs pursued their claims against the defendants in Singapore without even entering appearance much less registering any resistance. And then with the *ex parte* order the defendants wished that any REJA proceedings be pre-empted. Yet the defendants had every right to be heard and contest the proceedings under REJA if and when the plaintiffs make the necessary application thereunder. Registration of judgment sought to be enforced is not automatic and there are even provisions such as in ss. 5 and 6 of the REJA for the setting aside of judgments already registered.

[49] So, the defendants' argument on the fears concerning REJA is not only unfair but also less than well-grounded.

[50] As such the *ex parte* order of 16 July 2021 ought to be set aside as it would not only prejudice the plaintiffs who were not heard but also deprive them the opportunity to exercise their statutory right to invoke the provisions of REJA to enforce a judgment obtained in their favour in the High Court of Singapore. It prevents the exercise of a statutory right under REJA. For all intents and purposes, it defeats the application of REJA. It is almost like a contravention of statute that justifies the *ex parte* to be set aside.

The Issue Of Forum

[51] I would be inclined to agree with the plaintiffs' counsel that the issue of forum of convenience raised by the defendants is of no relevance at this stage given that judgments on the legal suits have been granted by the High Court of Singapore, and the same are eligible to be registered and enforced in accordance with the relevant provisions under the REJA.

[52] At the risk of repetition, the defendants could have but chose not to challenge the jurisdiction of High Court of Singapore in Singapore. Further, there is also merit in the plaintiffs' submission that the issue of forum of convenience is also not relevant to the setting aside of the *ex parte* order because the application is not a transfer application, which is only applicable to settle the conflict of localities within the different branches of the High Court and lower courts of Malaya, having regard to among others the provisions under s. 3 of the Courts of Judicature Act 1964 as well as s. 59 of the Subordinate Courts Act 1948 where the subordinate courts have exclusive and unlimited jurisdiction to hear running down claims, and O. 57 of the Rules of Court 2012 on transfer of proceedings.

[53] In any event although it is irrelevant now, it should still be mentioned that whilst the defendants' place of residence and the place of the accident is undoubtedly in Malaysia, the material witnesses of this accident, other than for the defendants, are all from Singapore. All of the plaintiffs are residing in Singapore. The doctors and medical professionals treating the plaintiffs too are all from Singapore. The administrators of the deceased plaintiffs are also all from Singapore, and some of the plaintiffs have practical difficulties to travel to Johor given the serious injuries sustained from the accident.

[54] In other words it certainly cannot be said that the place of business of the defendants and the place of accident must mean that the forum of convenience would be in favour of the Sessions Court in Muar. After all the relevant conditions are to be applied disjunctively (see *Siti Nur Aishah Ishak v. Golden Plus Holdings Bhd* [2017] 8 CLJ 272).

Applicability Of S. 96(3) Of The RTA

[55] There is one other argument posited by the defendants. It is this. They contended that the plaintiffs do not have the right to set aside the *ex parte* order because according to s. 96 of the Road Transport Act 1987, the

plaintiffs are not third parties within the meaning of the section with the result that there is no requirement for notice to be served on the plaintiffs under s. 96(3) before seeking a declaration. Further, the word "proceeding" in the said statutory provision must mean proceedings in Malaysia and not elsewhere, and that the RTA is not applicable to an action filed in Singapore.

[56] The defendants also made mention of the High Court decision in *Mohamad Rafiq Muiz Ahmad Hanipah v. Pacific & Orient Insurance Co Bhd & Ors* [2018] 1 LNS 942 where the application of s. 96(3) was stated as follows:

> [27] In this connection, no clearer judicial pronouncement of high authority on the right of the third party under Section 96(3) of the Act has probably been expressed other than by a recent Court of Appeal in *Pacific & Orient Insurance Co Berhad v. Rasip bin Hamsudi & Ors* [2017] 4 CLJ 572, to the following effect, in terms free from ambiguity:
>
> > [20] This interest of the first, second and third respondents was statutorily and expressly recognised by virtue of the terms of the proviso to s. 96(3) of the RTA. Any third party (like in this instance, the first, second and third respondents as plaintiffs) bringing a claim in court involving a vehicle (the subject of the mandatory third party risk insurance under RTA) was a recognised party named in the proviso to s. 96(3) as being entitled to be notified by the insurer (in this case the appellant) before or within seven days of the commencement of any proceedings under s. 96(3) to declare the relevant insurance policy to be void and unenforceable. Such notice, it would also be noticed, required the appellant to specify the grounds that would be relied on by the insurer in such an application.
> >
> > [21] It was also most significant to note that in the proviso itself it was spelt out that such third party (plaintiffs) if duly given the stipulated notice (with the grounds being relied upon) was entitled as a matter of right (at the sole option of such third party) be made a party to the proceedings brought by the insurer.

[57] The defendants now asserted that the plaintiffs were not entitled to the notice under s. 96(3) of the RTA since they are not parties to any proceedings in Malaysia. There is according to the defendants no requirement for notice to be served on the plaintiffs under the said s. 96(3) before seeking a declaration. The plaintiffs' action after all is in Singapore and is under the Republic's Motor Vehicles (Third-Party Risks & Compensation) Act (Cap. 189).

[58] It is I think useful for the relevant provisions of s. 96 of the RTA be set out herein, as follows:

96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks

(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

(2) No sum shall be payable by an insurer under subsection (1):

…

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

.... (emphasis added)

[59] As such, essentially, s. 96(1) spells out the liability of insurers under the subsisting policy of insurance to satisfy any judgment given against the insured person by making the necessary pay-out to those entitled to the benefit of the said judgment. These are the third parties, or those who suffered loss and damage because of the wrongful conduct of the insured who is covered under the relevant policy issued by the insurer.

[60] However, the insurer need not make any such insurance payment under s. 96(3) to the third party if, before the liability is incurred (usually prior to the accident), the insurer manages to get a declaration that the policy of insurance is void and unenforceable. This is subject to prior notice having first been given to the plaintiff in the underlying accident suit (the third party), before or within seven days of the commencement of the action by the insurer seeking the declaration.

[61] That much on the law is clear. But here, the *ex parte* order sought by and granted to the defendants was not premised on any application for a declaration under s. 96(3) of the RTA.

[62] There is a mention of s. 96(1) in the intitulement, but that was all there was to it. Absolutely nothing on s. 96(3) of the RTA in the course papers or in the written submissions. As such, the argument that the plaintiffs are not entitled to the notice under s. 96(3) is irrelevant.

[63] And also, even if assuming s. 96 of the RTA was applicable, going by the defendants' logic of argument, if they viewed, as they said they did, that the accident suit should properly be commenced in Malaysia such that the RTA ought to be the governing statute (and the plaintiffs should initiate the suit in the Sessions Court say in Muar), there is no rhyme or reason why the plaintiffs herein (who could potentially benefit from the judgment and the policy), as the third parties to the insurance contract between the first defendant and the two other defendants, were not served with any prior notice as mandated by the proviso to s. 96(3) before the defendants moved to apply for the declaration as granted in the *ex parte* order.

[64] In any event, it is however quite plain that this OS was filed by the plaintiffs not due to any complaint about the failure of the defendants to serve their notice to the plaintiffs under s. 96(3) of the RTA.

[65] Their grievance is predicated on the defendants' action in obtaining the *ex parte* order despite having the knowledge that final judgments had been granted to the plaintiffs in Singapore, with the effect that the enforcement of the REJA, an Act of Parliament in force in Malaysia is now potentially frustrated.

[66] For all intents and purposes if allowed to stand, the *ex parte* order has the dire consequence of violating the provisions on reciprocal enforcement of judgments between the courts in Malaysia and Singapore – by preventing the plaintiffs from relying on REJA.

Concluding Remarks & Decision

[67] It is worthy of emphasis that given the fact that the defendants had at all material times be given the opportunity to challenge the claims made by the plaintiffs in the jurisdiction of the High Court of Singapore but deliberately chosen not to do so, or to set aside the judgments pronounced by the High Court of Singapore but elected not to do so, I find there is justifiable basis to consider this setting aside favourably.

[68] This is especially so since the plaintiffs had notified the first defendant of the steps taken in the proceedings at the High Court of Singapore. Yet, the defendants sought for and obtained the *ex parte* order without notifying the plaintiffs, whilst at the same asked that the plaintiffs inform them if the plaintiffs were pursuing the registration of the judgments obtained from the High Court of Singapore under the Reciprocal Enforcement of Judgment Act 1958.

[69] Further, at this juncture and considering the status thus far achieved by the plaintiffs, considerations on jurisdiction and forum of convenience are of little significance if at all since judgments have been obtained from the High Court of Singapore and now likely to be proposed to be registered and enforced under the REJA. Most importantly, despite their protestations, the defendants would still have all the right to participate in and contest the proceedings under the REJA.

[70] As such, in view of the foregoing analysis and reasons, I therefore dismissed the preliminary objection raised by the defendants and allowed the application to set aside the *ex parte* order in this OS (encl. 1), with costs to the plaintiffs.